Supreme Court, U.S.
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No. 94-1540

In The

Supreme Court of the United States

October Term, 1994

CURTIS CHEEVES & THEDORE GIBSON, et al.,

Petitioners,

v.

SOUTHERN CLAYS, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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No. 94-1540

In The

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October Term, 1994

CURTIS CHEEVES & THEDORE GIBSON, et al.,

Petitioners,

v.

SOUTHERN CLAYS INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

A. Introduction

This Reply to the Brief in Opposition ("Opp. Br.") addresses in detail the three most important considerations favoring review by certiorari:

(1) The confused and divided state of disqualification law in general and vis-a-vis counsel in particular;

(2) The controlling facts and law not challenged by Respondents notwithstanding S.C. Rule 15's strong admonitions, which

facts and law dictate reversal of the summary judgments below *wholly apart* from the district court's disqualification to enter same; and

(3) The disingenuous and fallacious premises underlying every one of Respondents' reasons for denying the writ.

B. Overview of Disqualification Law

1. § 144 vs. § 455

Confusion reigns. 28 U.S.C. § 144 procedurally provides the objectivity of another judge at least in theory,[1] but no objective standard for decision. § 455 provides both general and specific objective standards but no procedure.

§ 144 turns upon personally verified *reality* whereas § 455, apart from the bright-line "interest" mandates of subsections (b)(2)-(5), turns exclusively upon objective *appearances* creating the likelihood that a judge's "impartiality *might* reasonably be questioned" by the lay public's perception of questionable appearances.

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[1] After denial of Petitioners' first recusal motion and motion for reconsideration, both filed under § 455 **only**, Petitioners' third recusal motion based on new district court disclosures proceeded under § 455 **and § 144.** Two affidavits of Petitioners' principals, four affidavits of trial counsel collectively representing 119 years of trial experience, and counsel's certificate of good faith were dismissed as facially insufficient to require reference to another judge. Petitioners' one-time § 144 attempt to obtain the objectivity of a different judge, just as in *Berger*, counted for naught. *Berger v. United States*, 255 U.S. 22, 27 (1921).

2. *Liljeberg* and *Liteky* – a Court Divided

The Court's *Liljeberg* and *Liteky* decisions[2] both reflect 5 to 4 division rather than unanimity. The Court is divided over disqualification *means* rather than disqualification *objectives*. The *Liljeberg* minority feared the illogical expansion of Rule 60(b)(6) vacatur[3] while the *Liteky* minority feared that a strict "extrajudicial" source requirement, even with a "fair judgment impossible" proviso, undermines the very breadth of § 455(a) protection intended by Congress and upheld in *Liljeberg*.[4]

3. Counsel-Based Circuit Constraints on § 455(a)

The question presented involving extrajudicial, counsel-based disqualification is precisely analogous to the *Liteky* minority's concern that the " 'impossibility of fair judgment' test bears little resemblance to the objective

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[2] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and *Liteky v. United States*, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

[3] Petitioners quite agree that *Liljeberg* is "long on ethics in the abstract, but short on workable rules of law" (*Liljeberg* dissent at 870) **unless,** as in the case at bar, the district court deliberately conceals disqualifying circumstances well known to it.

[4] Respondents argue that the question presented was not argued to the Eleventh Circuit (Opp. Br. 10-11). Petitioners, however, argued below that seven pages of disqualifying circumstances (Pet. 8-14), which remain completely unchallenged despite S.C. Rule 15's strong admonitions, dictated disqualification not only under § 455(a) (Reply App. 9-14) but also the "fair judgment impossible" proviso of *Liteky*. (Reply App. 15).

standard Congress adopted in § 455(a): whether a judge's 'impartiality might reasonably be questioned.' " *Liteky*, 114 S.Ct. 1161. In like fashion, circuit requirements insisting that counsel-focused judicial bias must be imputable to the *parties* or must be so "pervasive," "virulent," "exceptional" or "continuing" as to raise a presumption of potential harm to *parties* bear scant resemblance to the objective test of § 455(a).[5]

4. Respondents' Avoidance of Question Presented

Respondents beg the question presented in arguing that circuit caselaw reflects only "subtle differences in emphasis with the same basic standard" and in their next breath citing exclusively § 144 and § 455(b)(1) to the complete exclusion of § 455(a). (Opp. Br. 16). In doing so, Respondents only replicate the attempts of many circuits to "drive a square peg into a round hole" by equating counsel-based bias to party bias rather than resorting ***directly*** to § 455(a).

5. Breadth of § 455(a) – Congressional Intent

Congress did not exclude counsel from the ambit of § 455(a). Nor did Congress provide that circumstances must reflect "pervasive," "virulent," "exceptional," or

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[5] While finding no support in the language of § 455(a), such terms might readily satisfy the "fair judgment impossible" proviso of *Liteky*, a catchall provision which, though more restrictive than § 455(a), makes no distinction between parties and counsel. *See Liteky*, 114 S.Ct. 1157.

"continuing" appearances of animus toward counsel *before* the lay public's suspicions about the court's impartiality may be deemed *"reasonable."* Certainly Congress was equally mindful of this Court's perception "that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Liljeberg*, 486 U.S. 864-65. Stated more directly, could not the lay public fully informed of the undisputed course of events between the district court and Petitioners' counsel reasonably question whether the district court *might* just have lost the ability "to hold the balance nice, clear and true."[6]

In 1974, Congress imposed upon every district court the responsibility, without reference to another judge, of posing and answering itself the question of whether its "impartiality might reasonably be questioned" in any case. The ideal was self-enforcement of the standard. In the case at bar, however, the Court may search the record high and low but it will find not a single instance of the district court (Pet. App. 4-6), or Judge Hodges in considering Rule 11 sanctions (Opp. Br. App. 5a-15a), nor the Eleventh Circuit on mandamus or direct appeal, ever having even posed, much less answered, the inquiry demanded by Congress – whether the district court's "impartiality *might* reasonably be questioned" by fully informed lay citizens.[7]

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[6] *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

[7] Given the Respondents' insistence upon ignoring the fact that Petitioners' appeal is strictly limited to the district court's denial of the fourth and fifth disqualification motions, whose grounds were exclusively counsel-based, three points ignored

C. Respondents' Statement of the Case

Respondents have avoided the Court's Rule 15 admonition to "address any perceived misstatements of fact or law set forth in the petition . . . ".

1. Disqualification Facts Avoided

Respondents nowhere refute or object to a single word of Petitioners' seven-page enumeration of the objective circumstances warranting the lay public's reasonable doubts about the district court's impartiality. (Pet. 8-14). Exercising the objectivity which the district court, Judge Hodges and the Eleventh Circuit lacked, requires only answering the question of how many lay observers exposed to these undisputed circumstances would not seriously question the district court's impartiality. Unlike *Liljeberg*, the Court need not engage in speculation about what the district court knew and when did he know it.

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by Respondents should be made. (1) In contrast to the district court's dismissal of the first three recusal motions, the same evidence appended to Petitioners' § 372(c) complaint prompted the Eleventh Circuit's Chief Judge to impanel a special committee. (2) The special committee's investigative counsel found that the limited **actual facts** to which Petitioners' counsel had access " . . . *understandably* raised misconduct concerns . . . ". (Pet. 9) (emphasis in original). (3) The Petitioners' first three recusal motions related to their former agent, Robert L. Watkins, became moot when Petitioners unanimously terminated Watkins' services and his relationship to Petitioners' cases after Watkins' appeals and § 2255 motion had run their course.

2. Unconscionability Facts Avoided

Equally important to the grant of certiorari is the Respondents' complete avoidance of undisputed facts controlled by universal unconscionability authority. (Pet. 5, fn. 5). The enormity of Respondents' admitted conduct – i.e., purchasing 15 million tons of underground mineral reserves worth $4,900,000 for only $75,000, and selling the Gibson farm for $1,440,000 only one year after Respondents' $40,000 purchase (Pet. 5-6) – equals the purchase of a house worth $100,000 for only $1,500. These undisputed facts alone dispel the fiction that a circuit court's *de novo* review of summary judgments catches all errors committed below.

So damning are these undisputed facts and unconscionability law that Respondents (and the Eleventh Circuit) avoided them as completely below as they now do before this Court. Petitioners' unconscionability facts and arguments (Reply App. 7-9 and 21-22) were as unchallenged below (Reply App. 22, fn. 1) as they are now. Respondents must continue their avoidance of Petitioners' unconscionability counts at all costs because the district court's indisputable error as a matter of law in dismissing such counts as "constructive fraud" (Order of December 17, 1986 entering partial summary judgment for Respondents) is the Achilles' heel of the summary judgments affirmed below.

These undisputed facts and law guarantee that the Court's grant of certiorari, reversal and remand under either § 455(a) or § 2106 could not succumb to reaffirmance of the summary judgments under the harmless error rule applied in *In re Continental Airlines Corp.*, 901

F.2d 1259, 1263 (5th Cir. 1990) and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Therefore, unlike *Liteky* and *Liljeberg*, the court may confidently grant certiorari with the assurance that reversal of the district court's summary judgment and the Eleventh Circuit's affirmance is dictated as a matter of law by the district court's "constructive fraud" error.

3. Respondents' Avoidance of Objective Circumstances

Respondents' extensive focus upon procedural history is designed to divert the Court's attention from Respondents' inability to dispute objective appearances (Pet. 8-14) disregarded by both the district court and Judge Hodges. Indeed, Judge Hodges' Rule 11 decision relied precisely upon the circuit constraints upon § 455(a) challenged by the question presented (Opp. Br. 11a-12a). Totally ignored for example, are the § 372(c) proceedings, the district court's sworn testimony (Pet. 10-11) and the disparate treatment of Mr. Nix and Professor Patterson. (Pet. 11-14).

II. RESPONDENTS' REASONS FOR DENYING WRIT

A. The Recusal Orders Were Properly Appealed

Respondents' citation of inapplicable authorities relies upon the false premise that Petitioners' notice of appeal identified "specific issues" or "specific determinations" within the orders appealed. In fact, Petitioners' notice of appeal (Reply App. 1-3) identified only the

dates of the three **final** orders appealable as a matter of right. Respondents' "apple and oranges" argument is therefore adversely controlled by the general rule which they acknowledge (Opp. Br. 10) and Eleventh Circuit Rule 33-1(b)(1)(i) & (ii) providing for the identification of "other orders" appealed from in the Civil Appeal Statement. Reply Appendix pages 4-5 demonstrate that the recusal orders were properly identified as "other orders" appealed in the Civil Appeal Statement.

B. Issue Presented to Eleventh Circuit

Excerpts from the recusal argument of Petitioners below (Reply App. 9-18) prove Petitioners' exclusive reliance upon § 455(a) and even the "fair judgment impossible" standards of *Liteky* under the same objective circumstances now presented on certiorari. *Compare* Reply App. 11-14 with Pet. 8-14. What Respondents attempt to label as a "new issue" is but the Eleventh Circuit's error in failing to apply the existing standard of § 455(a) to counsel-based, extrajudicially sourced appearances of bias. The only feature of Petitioners' Petition not presented to the Eleventh Circuit is Petitioners' analysis of the circuit courts' inconsistency in their application of § 455(a) to bias against counsel.

C. Inapplicability of *Butts v. Southern Clays*

The Georgia Court of Appeals *Butts* decision is non-controlling. (Opp. Br. 11-13). The Court will find in *Butts* no mention whatsoever of the kind of unconscionability counts in *Cheeves & Gibson* which compel reversal as a

matter of law of the district court's "constructive fraud" error. Neither will the Court find in *Ennis* (Opp. Br. 13) any authority whatsoever adversely controlling the *Cheeves & Gibson* unconscionability counts.

D. Respondents Beg the Question Presented

Respondents' last argument (Opp. Br. 13-19) continues their avoidance of objective, extrajudicial circumstances (Pet. 8-14), perpetuates circuit error in attempting to deal with counsel-based bias exclusively under § 144 and § 455(b)(1) (Opp. Br. 16), and simply ignores the inconsistency apparent on the face of all the authorities reviewed by Petitioners. Such inconsistency remains notwithstanding Respondents' attempts to deny it.

III. CONCLUSION

Respondents respectfully pray that their petition for a writ of certiorari be granted in order to present the circuit courts with guidance insuring that all litigants before the United States courts are immunized under § 455(a) from bias against their **counsel** as well as themselves.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CURTIS CHEEVES, et al., Plaintiffs,	:	C.A. 86-43-1-MAC (WDO) NOTICE OF APPEAL
vs.	:	
SOUTHERN CLAYS, INC., et al., Defendants.	:	C.A. 86-44-2-MAC (WDO) NOTICE OF APPEAL
THEODORE GIBSON, et al., Plaintiffs,	:	
vs.	:	
SOUTHERN CLAYS, INC., et al., Defendants.	:	

NOTICE OF APPEAL

(Filed Jan. 10, 1994)

Notice is hereby given that the Plaintiffs in the above-styled causes, CURTIS CHEEVES, et al. and THEODORE GIBSON, et al., by and through their undersigned counsel of record, hereby appeal to the United States Court of Appeals for the Eleventh Judicial Circuit from the following Orders and Judgments entered in the above-styled consolidated causes:

(1) Order of September 14, 1993, entered on docket September 14, 1993;

(2) Judgment of September 15, 1993, entered on docket on September 16, 1993, said Judgment being pursuant to the above-referenced Order of September 14, 1993, granting summary judgment in favor of the Defendants; and

(3) Order of December 17, 1993, entered on docket on December 17, 1993, denying Plaintiffs timely filed Motion to Alter, Amend, and Reconsider the above-referenced Order of September 14, 1993.

True copies of the above-referenced orders are attached hereto and incorporated herein by reference.

All proceedings in the above-styled consolidated causes have already been transcribed and are already a part of the record. The Clerk of Court shall omit nothing from the record in transmitting it to the United States Court of Appeals for the Eleventh Judicial Circuit.

Plaintiffs' counsel have been advised by telephone that Mary C. Trawick, as Administratrix of the Estate of John Cheeves, and Myrian Trawick Hall, as Administratrix of the Estates of Rosetta C. Napier and Mary C. Trawick, wish to have their appeal from the above-referenced orders prosecuted by the undersigned counsel. Pursuant to the "Consent Order Pursuant to Status Conference of June 8, 1993" which was filed June 18, 1993, and the subsequent Consent Order entered July 27, 1993, Mary C. Trawick, Sarah Cheeves, Ernestine Cheeves, Myrian Trawick Hall, and Gloria Trawick Lord shall advise the Court by correspondence to be hereafter filed, that they have retained Messrs. Devine and Nix to prosecute their appeal as well as to prosecute as their counsel of record all further proceedings in the above-referenced *Cheeves* case.

This Notice of Appeal is filed as well on behalf of Ethel Cheeves Wilson, who is represented by G. Lee Dickens, Jr., Esq., this Notice of Appeal having been signed on Mr. Dickens' behalf with express permission.

Respectfully submitted this 7th day of January, 1994.

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IN THE UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

CURTIS CHEEVES, et al. and THEODORE GIBSON, et al.,	:	
Plaintiffs,	:	APPEAL No. _____
vs.	:	
SOUTHERN CLAYS, INC. and THE RHODE ISLAND CHARITIES TRUST,	:	
Defendants.	:	

INDEX TO ORDERS ATTACHED

Pursuant to Eleventh Circuit Rule 33-1(b)(1)(i) & (ii), indexed below are the Orders and Judgments appealed from in the above-styled cause:

SUMMARY JUDGMENT ORDERS	TAB
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8070

CURTIS CHEEVES et al., and
THEDORE GIBSON, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CLAYS, INC. et al.

Defendants-Appellees.

On Appeal from the United States District Court for
the Middle District of Georgia
Macon Division

BRIEF OF APPELLANTS

(Filed April 15, 1994)

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[p. 41] * * *

C. Plaintiffs' Evidence Creates A Jury Issue On The Tort Of Unconscionability, Which Is A Species Of Actual Fraud.

In Count Three of their respective complaints both the Cheeves and the Gibson families alleged that they were entitled to recover actual and punitive damages, as well as reasonable attorneys fees for that *per se* form of fraud defined in terms of unconscionability. (R1-1-8-9; SR1-1-8-9). In its original order granting partial summary judgment entered on December 17, 1986, the court below granted summary judgment as to Count Three concluding that [p. 42] "this court has its basis in constructive fraud, if fraud at all." (SR1-17-5 & 9).

The court below erred in holding that the tort of unconscionability is *constructive, rather than factual fraud.* The Supreme Court of Georgia has stated:

> "An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a *fraudulent advantage* of another. 'An unconscionable contract is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other'."

Hall v. Wingate, 159 Ga. 630, 667, 126 S.E. 796, 813 (1924).

Clearly the above-stated definition connotes wilful moral turpitude and dishonesty in contrast to "constructive fraud," which arises from innocent misrepresentations not made with a guilty purpose or intent to defraud. *Gaultney v. Windham,* 99 Ga. App. 800, 109 S.E.2d 914 (1959).

In the case of *Roberts Pest Control Company v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974), the Court of Appeals upheld a jury verdict awarding general and *punitive* damages to a home owner against a contractor based upon the theory of unconscionability. The court observed: "Unconscionability is *directly related to fraud and deceit*, which in turn may be found where there is great inadequacy of consideration *or* great disparity of mental ability." *Id.* 132 Ga. App. at 260, 208 S.E.2d at 15 (emphasis added).

There can be no question that punitive damages, formerly known as "exemplary damages", cannot possibly be awarded in cases of mere *constructive* fraud arising out of innocent misrepresentations. It is clear that the court below erred in granting summary judgment to the defendant on this count. In its order the court did not apply any law to the facts of this case. It simply granted summary [p. 43] judgment to the defendants upon its determination, unsupported by any legal authority, that the tort of unconscionability is one of constructive, rather than actual fraud. Although plaintiffs have twice moved the district court to reconsider its ruling, it has declined to do so. (R5-173-65-66; R7-239-1).

The above-cited abundant evidence in the record would readily support a jury's conclusion that Southern, a mining company operating through attorneys and persons knowledgeable in the industry, purchased from the Cheeves family 9,800,000 crude tons of kaolin worth at least $2,450,000 for only $35,000. Similarly, a jury could find from evidence that Southern purchased from the Gibson family 4,900,000 crude tons of kaolin worth ***at least*** between $1,440,000 to $2,450,000 for a payment of

only $40,000. The Georgia Code as well as common law holds that where the inadequacy of consideration in a contract is "great, it is a strong circumstance to evidence fraud." O.C.G.A. § 13-3-46. A jury could surely find from plaintiffs' damages evidence that these transactions were ones that "no sane man not acting under a delusion would make and no honest man would take advantage of . . . ". *Hall v. Wingate, supra.* Thus, the court committed reversible error in granting summary judgment to the defendants on Count Three of plaintiffs' complaints.

[p. 47] * * *

II. THE TRIAL JUDGE ERRED IN FAILING TO DISQUALIFY HIMSELF UNDER 28 U.S.C. § 455.

In orders entered on December 13, 1991 (RE-185) and on June 5, 1992 (RE-210), the district court denied two motions filed by plaintiffs seeking its recusal based upon claims of bias or prejudice on the part of the district court against plaintiffs' original counsel, Franklin R. Nix. Plaintiffs sought a petition for mandamus from this Court, which was denied per curiam on June 26, 1992. Plaintiffs have preserved this issue, and it is now presented to this Court in the context of a direct appeal from the entry of a final order. This Court's previous denial of the writ of mandamus does not foreclose review and reversal of those orders denying recusal. *E.g., Phillips v. Joint Legislative Committee,* 637 F.2d 1014 (5th Cir. 1981), *cert. denied,* 456 U.S. 960 (1982). When it previously considered plaintiffs' writ of mandamus, this Court was empowered to grant the extraordinary remedy only if it found under "exceptional circumstances that the district court was

"clearly and indisputably" in error. *E.g., United States v. Gregory*, 565 F.2d 1132, 1136 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 614 F. 2d 958, 962 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980). In the context of this direct appeal, this Court may now reverse the lower court upon a finding that it has abused its discretion through a clear "error of judgment." [p. 48] *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

A. STANDARD GOVERNING RECUSAL

28 U.S.C. § 455(a) provides:

> "Any justice, judge, or magistrate of the United States *shall* disqualify himself in any proceeding in which his *impartiality might reasonably be questioned.*" (Emphasis added).

This Court has observed that "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). The opinion goes on to hold:

> "The standard for recusal under section 455(a) is . . . **'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'** " *Ibid.*

In the recent case of *Liteky v. United States*, No. 92-6921, 62 LW 4161 (March 7, 1994), the United States Supreme Court addressed 28 U.S.C. § 455(a) in the context of "opinions formed by the judge on the basis of facts

introduced or events occurring in the course of the current proceedings, or of prior proceedings . . . ". *Id.* at 4165-4166. By a 5 to 4 decision, the Court ennuciated the test tnat such opinions "do not constitute a basis for a bias or partiality motion ***unless*** *they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id.* at 4166 (emphasis added).

Justice Kennedy's concurrence, joined in by Justices Blackmun, Stevens and Souter, expressed the opinion that the foregoing test was too lenient. "When the integrity of the judicial system is at stake," *id.* at 4168, the four justices stated:

> "The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute [p. 49] itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. *If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.* Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case." *Ibid.* (emphasis added).

B. OBJECTIVE CIRCUMSTANCES

The following facts relevant to antagonism on the part of the court below toward Franklin R. Nix, who ***remains*** plaintiffs' counsel, are as follows:

• Mr. Nix filed a judicial misconduct complaint against the district court on July 20, 1990, expressly complaining of the conduct of the district court in these cases and others. (Misc. Docket No. 90-2132, Complaint).

• Chief Judge Tjoflat, in the exercise of his screening authority to either dismiss a complaint or appoint a special committee under 28 U.S.C. § 372(c)(3), appointed a special committee, even before receiving the written responses of the district court. (Misc. Docket No. 90-2132, Order Appointing Special Committee; Answers to Complaint).

• During the special committee hearings, Chief Judge Tjoflat, in explaining why he convened a special committee stated that "[Mr. Nix] filed a complaint which on its face disclosed all sorts of criminal activities." (Misc. Docket No. 90-2132, Transcript Vol. III, January 9, 1992, at 243).

• The special committee retained as its lead private investigative counsel Alan Sundberg, Esq., a former justice of the Supreme Court of Florida. Based upon an exhaustive investigation, former Justice Sundberg issued a 44-page Investigative Report containing, *inter alia*, the following conclusion. [p. 50]

> "The § 372 complaint raises ***serious claims*** of misconduct by Judges Fitzpatrick and Owens involving a trio of kaolin cases [including *Cheeves* and *Gibson*] . . .
>
> * * *
>
> We have investigated each of Nix's misconduct claims. In the main, your investigators conclude

> that the allegations of misconduct are the product of inference and speculation which are based upon very slender reeds of ***actual fact.*** While the interpretation and liberal extrapolation by Nix of the ***limited facts to which he had access*** **may have *understandably* raised misconduct concerns,** investigation of the factual allegations of the complaint refute beyond any doubt the misconduct charges alleged in the complaint. Although we find no evidence to support the § 372 complaint, ***we hasten to add that we do not believe the complaint was filed by Nix in bad faith or with an improper motive.***"

(Misc. Docket No. 90-2132, Investigative Report, Defendant's Ex. IC-A at 6-7 (emphasis added).

• Notwithstanding the court's assertion in its order of June 5, 1992 that it "harbors no bias or prejudice against Mr. Nix or his clients" (R7-21-3), the district court's previous *sworn* testimony before the special committee might reasonably suggest otherwise to § 455's hypothetical man in the street. Under questioning by Judge Truman Hobbs of the Middle District of Alabama, the court below, to its credit, candidly admitted holding the following attitudes toward plaintiffs' counsel:

> [Judge Owens]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. ***I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal [with] repeatedly on 2255.***

(Misc. Docket No. 90-2132, Transcript Vol. II of October 10, 1991, at 342-43) (emphasis added).

• On June 5, 1992, the court issued its order denying plaintiffs' April 9th recusal motion (R6-207) and directed plaintiffs' counsel to "show cause" why he should not be sanctioned [p. 51] under Rule 11 for "harassment" of the court.[7] (R7-210).

• Just three days later, on June 8, 1992, L. Ray Patterson, Esq., a professor at University of Georgia School of Law, acting as counsel for Mr. Nix, filed a motion to recuse the district court in *United States v. Watkins*, C.A. No. 92-32-3-MAC (WDO), founded upon identical grounds previously relied upon by Mr. Nix and incorporating by reference ***every*** prior reversal motion previously filed in *Cheeves* and *Gibson*.

• The district court, however, did not characterize the motion filed by Mr. Patterson as "harassment," nor did it issue an order requiring Mr. Patterson to show cause why he should not be sanctioned under Rule 11.

C. FAILURE TO RECUSE WAS A CLEAR ERROR OF JUDGMENT.

It is clear from the record that there is "a deep-seated . . . antagonism" by the district court toward plaintiffs' counsel, Franklin R. Nix. The judicial misconduct complaint filed by Mr. Nix against the district court alleged criminal misconduct on the part of the judge. There is no

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[7] The district court on Friday, June 5th, had to have known that the misconduct charges filed by plaintiffs' counsel would be dismissed on Monday, June 8th, because § 372(c)(14) required Chief Judge Tjoflat to obtain the court's consent to make public the proceedings.

way of knowing, to an absolute certainty, how the judge really feels about Mr. Nix or the plaintiffs in this case. The judge did candidly admit in his testimony before the special committee that he "just can only deal with him if I say as little as necessary." He also said that Mr. Nix reminded him "a lot of some of the prisoners we have to deal [with] repeatedly on 2255." [p. 52]

The court below has stated that he "harbors no bias or prejudice against Mr. Nix or his client." (R7-21-3). The implication of this statement is that the judge fully expects to give the plaintiffs in this case and Mr. Nix a "fair judgment." *Liteky, supra* at 4166. However, given the history and antagonism between the judge and Mr. Nix, plaintiffs submit, with all due respect to the judge, that a "***fair judgment***" in this matter is impossible.

Strong evidence of the impossibility of a fair judgment is a comparison of the court's rulings in the case at bar with its decision in the strikingly similar case of *McLendon, supra.* In that case, the same judge held that genuine issues of material fact requiring a jury trial existed as to whether a "***buyer with superior knowledge***" had a duty to disclose the presence of kaolin and whether the sellers acted with due diligence so as to toll the statute of limitations. The evidence presented by the plaintiffs in the case at bar is substantively indistinguishable from the evidence presented in *McLendon.* The only plausible explanation for the disparate treatment of ***other counsel*** and plaintiffs in *McLendon* is that the "deep-seated . . . antagonism" between the court below and Mr. Nix has in fact made "fair judgment impossible." *Liteky, supra*

at 4166. Plaintiffs respectfully submit that the court committed a "clear error of judgment" in failing to recuse itself. *United States v. Kelly* at 745.

In *Kelly*, this Court found that the Honorable Richard Freeman committed a "clear error of judgment" in failing to recuse himself based upon his admitted "***discomfort***" in presiding over a criminal trial in which the *husband* of a woman who was a close personal friend of Judge Freeman's wife was called to testify as a ***defense*** [p. 53] witness. Surely the above-quoted antagonism and admitted attitude of the court below toward Mr. Nix substantially exceeds the mere "discomfort" level held by this court to satisfy the "clear error of judgment" standard applied in *Kelly*.

D. ADMINISTRATIVE REASSIGNMENT UNDER 28 U.S.C. § 2106

28 U.S.C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This section allows this Court broad discretion to require upon remand that a different judge handle the cases at bar during future proceedings. Such a remedy would seem most appropriate in this matter. Plaintiffs in

seeking a "level playing field," need not insist upon an outright disqualification order, which might give rise to adverse inferences regarding the district court's prior denial of recusal motions.

Moreover, 28 U.S.C. § 292(b) provides that the chief judge of the circuit "may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." Under this provision, Chief Judge Tjoflat has twice assigned a judge to hear matters in connection with this case.

Plaintiffs submit that under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), it is not only impartiality which is important, but also the appearance of impartiality. An assignment of a different judge to hear all matters relative to this case in the future will not only guarantee the impartiality of the federal judiciary, but equally as important, it will protect [p. 54] the appearance of impartiality as well. For the foregoing reasons, plaintiffs urge that a reassignment be directed on remand.

As observed more than fifty years ago by the Supreme Court in the context of sustaining a disqualification under 28 U.S.C. § 144,

> "there is no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; of what concern to other parties to have him so preside?"

Berger v. United States, 295 U.S. 22, 35 (1921).

CONCLUSION

For the foregoing reasons plaintiffs submit that the court below erred in granting summary judgment to the defendants. Numerous genuine issues as to material facts are presented by abundant evidence in the record, including, *inter alia*, whether defendant had a duty to disclose, whether plaintiffs and defendants were in confidential relationships and whether plaintiffs acted with due diligence so as to toll the statute of limitations. Plaintiffs therefore respectfully pray that this Court enter appropriate orders reversing the entry of summary judgment below and reassigning these cases for trial before a different judge in the exercise of the Court's supervisory powers under 28 U.S.C. § 2106.

Respectfully submitted this 13th day of April, 1994.

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(signatures continued)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8071

CURTIS CHEEVES, et al. and
THEODORE GIBSON, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for
the Middle District of Georgia
Macon Division

PETITION FOR PANEL REHEARING
(Filed Nov. 23, 1994)

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IN THE UNITED STATES COURT OF APPEALS
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THEDORE GIBSON, et al.,
Plaintiffs-Appellants,

v.

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Defendants-Appellees.

PETITION FOR PANEL REHEARING

I. INTRODUCTION

As a matter of controlling Georgia law under *Erie*, ***both*** of the plaintiffs' actual fraud counts require proof of ***only*** two elements.

A. FRAUD BY SUPPRESSION OF MATERIAL FACTS – §23-2-53.

1. Prima Facie Elements. – "Suppression of material fact as fraud" (R1-1-15; SR1-1-13) requires proof of ***only two essential elements*** under §23-2-53's "particular circumstances" standard: "1) the intentional concealment of a fact and 2) for the purpose of obtaining an advantage or a benefit." *Crawford v. Odom*, 211 Ga. App. 367, 369 (1993).

2. Plaintiffs' Evidence. – In the cases at bar, it is ***undisputed*** that: (1) Defendants' ***admittedly withheld*** from plaintiffs (R5-153-10), consistent with their ***policy*** of nondisclosure (R3-100-206-210; R2-61-46-50; R4-146-152,

159, 213-14), prepurchase quantity, quality, and commercial value [p. 2] information obtained from exploration of plaintiffs' lands (R5-175-Tabs 20, 69 & 70); and (2) withheld such facts for the purpose of obtaining the ***benefit*** of paying the *Cheeves & Gibson* families total payments of **$75,000** for kaolin reserves having a combined value of approximately **$5,000,000** according to the defendants' president's ***own value admissions***. (R5-175 Tab 128; R3-100-241; R5-148-54-59).

B. ACTUAL FRAUD PER SE IN THE FORM OF UNCONSCIONABILITY.

1. Prima Facie Elements. – Both Georgia and federal common law define actual fraud in the form of unconscionability as follows:

> An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes fraudulent advantage of another. An unconscionable contract is one such as no man in his senses and not acting under a delusion would make on the one hand, and as no honest and fair man would accept on the other.

Hall v. Wingate, 159 Ga. 630 (1924); *Hume v. United States,* 132 U.S. 406 (1889).

A finding of unconscionability requires proof of only two elements: (1) a delusion (in the cases at bar that the defendants' leases were enforceable); and (2) an unconscionable result reflecting "great inadequacy of consideration." *Roberts Pest Control Co. v. McDonald,* 132 Ga. App. 257, 260 (1974).

2. Plaintiffs' Evidence. – The evidence already recited above – i.e., defendants' procurement of minerals worth almost **$5,000,000** for only **$75,000** – satisfies both "the delusion" [p. 3] and "great inadequacy of consideration" elements of unconscionability. Indeed, the enormity of permitting these transactions to stand can best be understood by comparing them to a hypothetical in which someone sells his home worth **$100,000** for only **$1,500,** ***one sixty-fifth*** of its fair value![1]

* * *

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[1] Although both of the *Cheeves & Gibson* complaints clearly stated counts in unconscionability (R1-1-14; SR1-1-12), which were fully argued at pages 41-43 of the Brief of Appellants, ***both*** of the District Court's orders below (R7-240-1; R8-256-1) ***and even the Brief of Appellees are totally devoid*** of any mention whatsoever of plaintiffs' unconscionability counts, much less any conclusive proof that plaintiffs' above-stated evidence fails to satisfy the two elements of unconscionability.